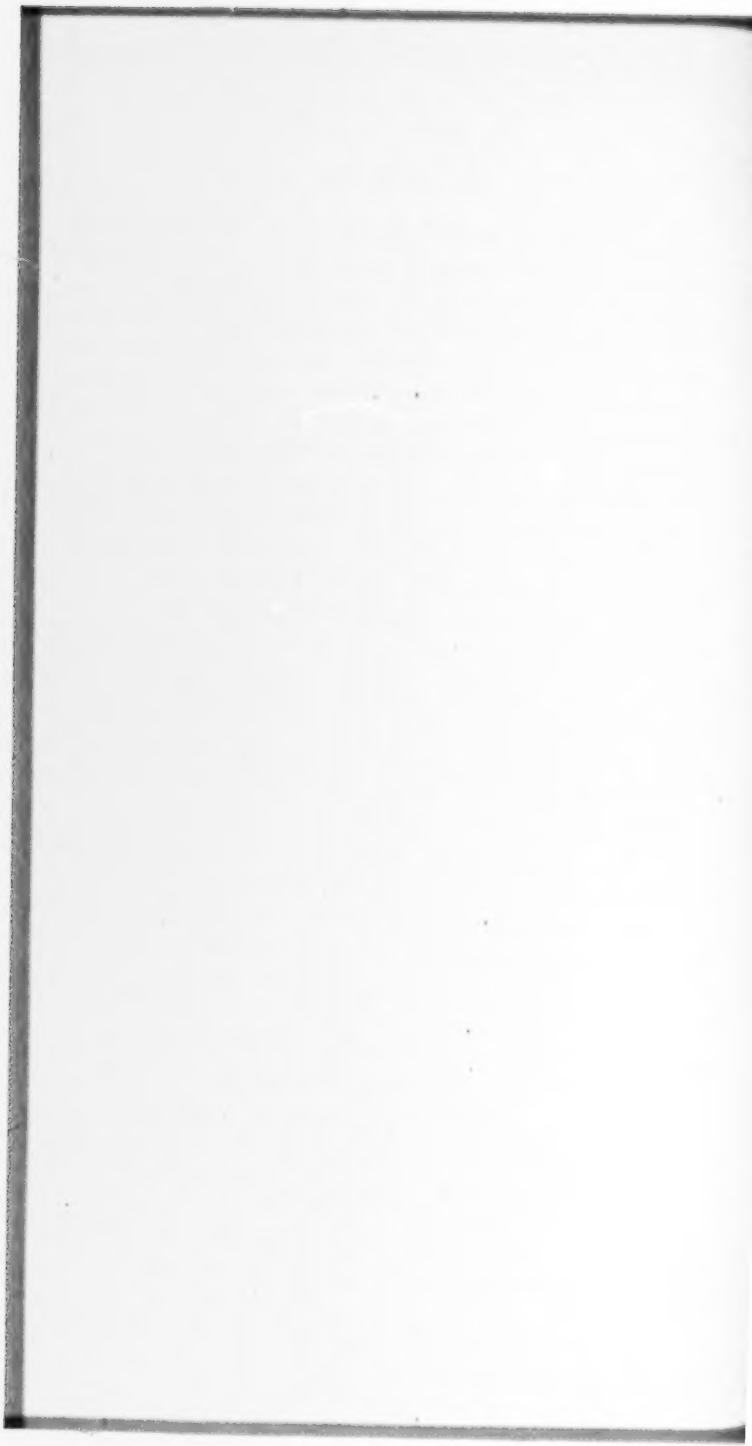

Supreme Court of the United States

OCTOBER TERM, 1908.

No. 707.

ST. LOUIS DRESSED BEEF AND PROVISION COMPANY, *Appellant*,

vs.

MARYLAND CASUALTY COMPANY, *Appellee*.

On a Certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF ON BEHALF OF THE APPELLEE.

FRANK GOSNELL,
GEO. WEEMS WILLIAMS,
Attorneys and of Counsel for Appellee.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1905.

No. 197.

ST. LOUIS DRESSED BEEF AND PROVISION COMPANY, *Appellant*,

vs.

MARYLAND CASUALTY COMPANY, *Appellee.*

On a Certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF ON BEHALF OF THE APPELLEE.

STATEMENT OF FACTS.

On the 16th day of June, 1900, the appellee, a corporation of the State of Maryland, hereinafter sometimes called "the company," in consideration of a premium of $168.00, issued to the appellant, a corporation of the State of Missouri, sometimes hereinafter called "the assured," its policy wherein and whereby it agreed "to *indemnify* the assured" for the term of one year from the 5th day of July, 1900, at noon; (italics and small caps ours)

"AGAINST LOSS FROM COMMON LAW OR STATUTORY LIABILITY for damages on account of bodily injuries, fatal or non-fatal, accidentally suffered by any person or persons, and caused through the negligence of the assured, by means of the horses or vehicles in his services, and the use thereof, as described in the application and while in the charge of the assured or his employees.

Provided, however, that :

A. The company's liability for an accident resulting in injuries to or in the death of one person is limited to five thousand dollars ($5,000), and subject to the same limit for each person; the total liability for any one accident resulting in injuries to, or in the death of any number of persons is limited to ten thousand dollars ($10,000).

This insurance is subject to the *following conditions*, which are to be construed as *conditions precedent* of this contract :

1. The assured, upon the occurrence of an accident, shall give immediate notice thereof in writing, with full particulars to the home office of any claim which may be made on account of such accident.

2. If thereafter any suit is brought against the assured to enforce a claim for damages on account of an accident *covered by this policy*, immediate notice thereof shall be given to the company, and the company will defend against such proceedings, in the name and on behalf of the assured, or settle the same at its own cost, unless it shall elect to pay the assured the indemnity provided for in clause "A" of special agreements as limited therein.

3. The assured shall not settle any claim, except at his own cost, nor incur any expense, nor interfere in any negotiation for settlement or in any legal proceeding, without the consent of the company previously given in writing, but he may provide at the time of the accident such immediate surgical relief as is imperative. The assured when requested by the company shall aid in securing information and evidence and in effecting settlements, and in case the company calls for the attend-

ance of an employee or employees as witnesses at inquests and in suits, the assured will secure his or their attendance, making no charge for his or their loss of time.

8. No action shall lie against the company as respects any loss under this policy unless it shall be brought by the assured himself to reimburse him for loss actually sustained, and paid by him in satisfaction of a judgment after trial of the issue. No such action shall lie unless brought within the period within which a claimant might sue the assured for damages unless at the expiry of such period there is such an action pending against the assured, in which case an action may be brought against the company by the assured within thirty days after final judgment has been rendered and satisfied as above.

In no case, except that of minors, shall any action lie against the company after the expiration of six years from the date of the given injuries or death. The company does not prejudice by this clause any defenses to such action which it may be entitled to make under this policy.

This policy shall only cover losses sustained by and liability for any claims against the assured as a result of the risk specified in the contract or contracts hereto attached, and is issued and accepted upon the condition that all the provisions printed on the slip or slips attached to this policy are accepted and shall be fulfilled by the assured as part of this contract as fully as if they were recited at length over the signatures hereto affixed."

That portion of the policy above quoted, except the last paragraph, commencing with the words "This policy shall only cover" was printed on the slip attached to the policy.

It appears that on May 25, 1901, a certain Nellie Heideman was injured through the alleged negligence of the assured by means of a horse and wagon in its service, while in charge of one John Berry, who was alleged to have been in the employ of the assured. The assured immediately gave notice of the accident to the company, and of the fact

that Mrs. Heideman made a claim against the assured on account of the bodily injuries she had so suffered, and that Henry Heideman, her husband, also made a claim for damages for loss of her services and medical attendance. On August 16, 1901, the company notified the assured that it denied liability because the driver of the wagon was not an employee of the assured.

On November 23, 1901, two suits were instituted against the assured growing out of the accident, one by Nellie Heideman for $10,000 and the other by Henry Heideman for $3,000. Within one week thereafter the company was notified in writing of the suits and requested to undertake the defense of the same, but declined to do so, alleging that its policy did not cover the accident or the claims. The assured, itself, thereupon undertook the defense of the suits, and on April 15, 1902, before they came on to be tried compromised them by paying Mrs. Heideman $2,000 and Mr. Heideman $500; the assured also paid $250 to its counsel for professional services rendered in defense of the actions. Before making the compromise, however, the assured notified the company in writing of the terms of the proposed settlement and of its purpose to pay the amounts and to hold the company responsible for the same. The company interposed no objection to the proposed settlement, relying upon its disclaimer of any liability under the policy, because the driver of the wagon was not an employee of the assured. The reason the compromise was made was because the assured "*feared heavy judgments if the actions were permitted to proceed to trial.*"

After the compromise of the suits, the assured brought its action against the company to recover the amounts so paid in settlement of the two Heideman suits, and the amount paid its counsel for defending the same down to the time of settlement, and in its petition averred the facts above detailed and also averred that the driver of the wagon in

question was in its employ at the time of the accident, and that the assured was liable in damages to the Heidemans in consequence thereof, and that the accident was covered by the policy. The company demurred to the petition, which demurrer was sustained by the Circuit Court, and the petition dismissed. Upon a writ of error to review this judgment, the learned Judges of the Circuit Court of Appeals for the Eighth Circuit, (Sanborn and Van Devanter, Circuit Judges, and Philips, District Judge), being in doubt, desire the instruction of this Honorable Court upon the following questions:

"1. Did the denial of all liability by the assurer and its refusal to defend the suits in the name and on behalf of the assured as provided by paragraph 2 of the policy constitute such a breach of the contract on its part that it released the assured from its agreement in paragraph 3 that it would not settle any claim except at its own cost without the consent of the assurer previously given in writing, and from the provision of paragraph 8 that no action should lie against the assurer as respects any loss unless for loss actually sustained and paid by the assured in satisfaction of a judgment after trial of the issue?

2. Were the provisions of paragraphs 3 and 8 of the policy that the assured should not settle any claim except at its own cost, without the consent of the assurer, previously given in writing, and that no action should lie against the assurer as respects any loss under the policy unless brought by the assured to reimburse it for loss actually sustained and paid by it in satisfaction of a judgment after trial of the issue, waived by the assurer's denial of liability under the policy and by its failure and refusal to defend the suits against the assured according to the provision in paragraph 2?

3. Did the compromise by the assured of the suits against it after the assurer denied liability and refused to defend them and the payment by the assured of the damages claimed of it pursuant to the compromise without the consent of the assurer and without the rendition of a judgment or a trial of the issues prevent the assured

from securing any recovery of the assurer upon the policy on account of the negligence, accident and injuries described?

4. Considering the terms of the policy, is the right of the assurer to insist upon the condition of paragraph 8 respecting the rendition of judgment after trial and its satisfaction by the assured dependent upon the assurer's defense of the action against the assured according to the provision in paragraph 2?

5. Considering the terms of the policy, is the assurer's denial of liability under the policy a waiver of the condition in paragraph 8 respecting the rendition of judgment after trial and its satisfaction by the assured?

6. Under the terms of the policy may the liability of the assured to the injured person and the extent of that liability be litigated in the first instance in an action between the assured and the assurer where the assurer has denied its liability under the policy and has refused to defend an action brought against the assured by the injured person?"

ARGUMENT.

Briefly stated the questions certified are as follows:

1, 2, 3. Did the fact that the company denied liability and refused to defend the Heideman suits constitute such a breach of contract *as released the assured* from its agreement not to settle the suits *without the written consent of the company*, and, from the provision of the policy that *no action should lie against the company* UNLESS FOR LOSS ACTUALLY SUSTAINED AND PAID BY THE ASSURED IN SATISFACTION OF A JUDGMENT AFTER TRIAL OF THE ISSUE, as stated in the first question, or as put in the second question, were these provisions in favor of the company *waived* by its denial of liability and failure to defend, and as embraced in the third question did the compromise of the suits in view of such denial and failure prevent a recovery from the company?

4, 5. Is the right of the company to insist upon the provisions of paragraph 8 of the policy dependent upon its defense of the suits against the assured, and did the com-

pany waive the provisions of that paragraph by its denial of liability; these are the propositions contained in the fourth and fifth questions.

6. May the liability of the assured to Mrs. Heideman and the extent thereof in the circumstances narrated, be litigated in the first instance in this action?

It is to be observed that these several questions paraphrase this single proposition: Whether or not the company, notwithstanding it denied liability under its policy and refused to defend the Heideman suits, had the right to insist (1) that the suits could not be settled by the assured *except at its own cost* without the written consent of the company, and (2) that there can be no recovery against it whatever, because the claim of the assured is not for reimbursement of a *loss actually sustained and paid by it in satisfaction of a judgment after trial of the issue.*

That the company is correct in its contention that the assured is not entitled to recover, is to us, perfectly manifest. The intention of the parties is plain and unambiguous. The company agreed to *indemnify the assured* "AGAINST LOSS FROM COMMON LAW OR STATUTORY LIABILITY." The insurance is subject to certain *conditions precedent*, one that the assured should not, *except at its own cost*, settle any claim without the written consent of the company, and another that "*No action shall lie against the company* as respects any loss under this policy, *unless it shall be brought by the assured himself to reimburse him* FOR LOSS ACTUALLY SUSTAINED AND PAID BY HIM IN SATISFACTION OF A JUDGMENT AFTER TRIAL OF THE ISSUE."

It is to be observed that this policy is one of the most modern in form and must not be confused with those heretofore in use and under which recovery could be had the moment the assured became liable for damages. There is a clear distinction between a contract against "LIABILITY FOR DAMAGES" and a contract of indemnity against "LOSS FROM LIABILITY FOR DAMAGES." In the former, an action may be

brought, and a recovery had, as soon as the liability is legally imposed—such are those involved in the cases relied on by the assured in the present action—while in the latter, *i. e.*, similar to the one at bar, it has never been held, except in New Hampshire, that a cause of action arose, until payment by the assured of a judgment recovered after a trial of the issue.

As stated in Gilbert vs. Wiman, 1 N. Y. 550:

> "In contracts of indemnity where the obligation is to perform some specific thing or to save the obligee from a charge or liability, it seems the contract is broken when there is a failure to do the specific act, or when such charge or liability is incurred.
>
> "But where the obligation is that the party indemnified shall not sustain damage or molestation by reason of the acts or omissions of another, or by reason of any liability incurred through such acts or omissions, *there is no breach* UNTIL ACTUAL DAMAGE IS SUSTAINED.
>
> "And in such cases a judgment recovered against the party indemnified, on account of the acts or neglect of another for which he is answerable, *without payment of the judgment*, or some part thereof, does not entitle him to sustain an action against the indemnitors."

To the same effect are the following cases:

Frye, Admr., vs. Bath, Gas and Electric Co., 97 Me. 241; s. c. 59; L. R. A. 44; (1903.)

Moses vs. Travellers' Ins. Co., 63 N. J. Eq. 260; s. c. 49 Atl. Rep. 720; (1901.)

Finley vs. United States Casualty Co., 83 S. W. Rep. 2; (1904.)

Cushman vs. Fuel Co., 122 Iowa, 656; (1904.)

Connolly vs. Bolster, 72 N. E. Rep., 981, Mass.; (1905.)

O'Connell vs. N. Y., N. H. & H. R. R., 187 Mass. 272; s. c. 72 N. E. R. 979.

Munro vs. Maryland Casualty Co., Supreme Court, N. Y.; (1905.)

Henderson & Bro. vs. Maryland Casualty Co., Superior Court of Penna.; (1905.)

In Frye, Admr., vs. Bath, Gas and Electric Co., (*supra*), the Maine Judicial Court construed a policy of insurance identical in terms with the one now under consideration, with the exception that there was no limit as to the time within which the assured should satisfy the judgment.

It appears that the Fidelity and Casualty Company issued to the Bath, Gas and Electric Company its policy of insurance "*against loss from common law or statutory liability for damages* on account of bodily injuries, fatal or non-fatal, accidently suffered by any employees of the assured whilst on duty." One of the conditions of the policy was as follows:

> "No action shall lie against the company [the insurer] as respects any loss under this policy, unless it shall be brought by the assured himself, *to reimburse him for loss actually sustained and paid by him*, in satisfaction of a judgment after trial of the issue."

One of the employees of the assured met with an accident whilst in its employ, and brought suit against the assured. He having died in the meantime, a judgment was rendered in favor of the appellant, his administrator. Thereafter the assured became insolvent, and made a common law assignment for the benefit of its creditors, and the judgment recovered as above mentioned, became worthless. A bill in equity was then filed by the Administrator of the employee against the assured, also its assignee under the common law assignment, and against the Fidelity and Casualty Co. It was there decided that—

> "A contract to indemnify an employer *against loss by reason of liability* for accidental injuries to employees, does not inure to the benefit of an injured employee, so that he can enforce payment of it in case the employer becomes insolvent and makes an assignment for creditors before he receives his judgment, so that the judgment cannot be enforced—especially where the contract provided that no action shall lie against the insurer, as

respects any loss under the policy, unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue."

Wiswell, Chief Justice, in delivering the opinion of the Court, said in part, (italics and small caps ours):

"We are unable to perceive any ground upon which the bill can be sustained and the relief prayed for granted. The contract of the insurer was with the Gas Company to indemnify that Company '*against loss*' from liability for damages on account of bodily injuries accidently suffered by an employee, and caused by the negligence of the assured. The use of the word '*indemnify*' shows the object and nature of the contract. It was to reimburse, or make whole, the assured against loss on account of such liability. There can be no reimbursement when there has been no loss. The contract of insurance contains nothing to show that it was the object or intention of the contracting parties that the insurer should guarantee the Gas Company's liability for negligence to its employees. *It was not a contract of insurance against liability*, but of INDEMNITY AGAINST LOSS BY REASON OF LIABILITY.

"This distinction was clearly recognized in the case of Anoka Lumber Co. vs. Fidelity and Casualty Company, 63 Minn., 286, 30 L. R. A., 689, 65 N. W. 353. *There is no stipulation in this contract* that the insurer shall pay to the employer '*all sums for which it shall become liable to its employees*,' as in Hoven vs. Employers' Liability Assur. Corp. 93 Wis. 201, sub. nom. Hoven vs. West Superior Iron and Steel Co., 32 L. R. A. 388, 67 N. W. 46. Nor did the insurer contract to pay, '*all damages with which the insured might be legally charged, or required to pay, or for which it might become legally liable*,' as in American Employers' Liability Ins. Co. vs. Fordyce, 62 Ark., 562, 36 S. W. 1051, in which this distinction is noticed in this language: 'The difference between a contract of indemnity and one to pay legal liabilities is, that upon the former an action cannot be brought and a recovery

had until the liability is discharged, whereas, upon the latter, the cause of action is complete when the liability attaches.

"In this case, as we have seen, the contract was one of indemnity only. It was not obtained by the Gas Company for the benefit of its employees, but for its own benefit exclusively, to reimburse it for any sum that the company might be obliged to pay, and had paid on account of injuries sustained by an employee through its negligence. Independently of the *condition* in the contract of insurance above quoted, WE SHOULD BE COMPELLED TO CONSTRUE THIS CONTRACT AS ONE OF INDEMNITY ONLY.

"*But this provision puts an end to all questions or doubt, if any there could be.* The parties have expressly provided in the contract which they chose to make, that 'NO ACTION SHALL LIE against the Company AS RESPECTS ANY LOSS UNDER THIS POLICY, unless it shall be brought by the assured himself *to reimburse him for loss actually sustained and paid by him* in satisfaction of a judgment after trial of the issue.' By reason of the unequivocal language of this provision, the undertaking of the insurer was expressly limited to liability in an action brought by the insured, '*to reimburse him for loss actually sustained and paid by him.*' THERE CAN BE NO DOUBT ABOUT THE MEANING OF THIS LANGUAGE, AND NO QUESTION ABOUT THE RIGHT OF THE CONTRACTING PARTIES TO INSERT SUCH A PROVISION IN THEIR CONTRACT FOR THE PURPOSE OF MAKING CLEAR THE NATURE AND LIMIT OF THE LIABILITY OF THE PARTIES OR OF EITHER OF THEM."

Moses vs. Travellers Insurance Co., (*supra*), decided by the Court of Errors and Appeals of New Jersey, is another case where a policy, containing precisely similar language, was construed, and it was held that not the amount of the employee's judgment, but the amount paid by the employer thereon, was the sum for which the insurer was responsible. The Court decided that the transfer of the employer's property to a trustee in bankruptcy, by operation of the United States Bankrupt Act, was payment within the requirement

of this clause, and perfected the liability of the insurer for so much as the employee was entitled to receive out of the bankrupt's estate; that this liability of the insurer passed to the trustee in bankruptcy; and that the amount for which the insurer was liable would be determined by ascertaining what percentage all the assets of the bankrupt, outside of the insurance policy, would pay on all the debts proved against the estate, outside of the employee's judgment.

In Finley vs. U. S. Casualty Co. (*supra*), the policy contained conditions identical in terms with those in the case at bar. The Supreme Court of Tennessee held as follows:

> "Agreements in an employer's liability policy, that if suit is brought against the assured, he shall immediately forward the process to the insurer, which will defend against or settle the claim, do not, when considered with a provision of the policy declaring its purpose to be indemnity to the assured *'against loss from liability for damages;'* and another agreement that no action shall lie against the insurer in reference to any loss under the policy unless brought by the insured himself to reimburse him for payment by him in satisfaction of a judgment, render the policy one of indemnity against liability, but IT IS A POLICY AGAINST LOSS OR DAMAGE BY REASON OF LIABILITY, UNDER WHICH THE AMOUNT OF INSURANCE DOES NOT BECOME AVAILABLE until payment of loss by the assured."

In Cushman vs. Fuel Co. (*supra*), the policy was issued by the London Guarantee and Accident Co. to the Carbondale Fuel Co. Cushman was an employee of the Fuel Company, and having been injured, brought an action, and recovered a judgment against the Fuel Company. The Fuel Company being insolvent, Cushman instituted proceedings against it and the guarantee company for the recovery of the judgment. The policy contained a provision that no action should lie for a loss unless brought *"by the assured to reimburse him for a loss actually sustained and paid in satisfaction of a judgment after the trial of the issue."*

Sherwin, Judge, in delivering the opinion of the Court, said at page 657 (italics and small caps ours):

> "While the policy provided that the guarantee company might appear and defend for the Fuel Company in any action brought against it for personal injuries, such provision was for the protection of the guarantee company alone, and imposed no liability upon it beyond the terms of the contract. * * * The only obligation of the guarantee company was to indemnify the Fuel Company against a '*loss actually sustained and paid in satisfaction of a judgment after the trial of the issue.*' This covenant is AS EXPLICIT AND CERTAIN AS LANGUAGE COULD WELL MAKE IT, and as between the parties to the contract, no recovery could be had against the guarantee company because the judgment against the Fuel Company was not paid, and, consequently, the covenant was not broken."

So in the case of Connolly vs. Bolster, (*supra*) where the policy was subject to the agreement, that if any suit should be brought for damages immediate notice should be given the insurer, so that it could defend or settle the same, and that the assured would not settle or interfere with negotiations for settlement or in any legal proceeding, without the consent of the insurer, and it was further provided that "*no action shall lie against the insurer for any loss under the policy unless it be brought by the insured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after a trial of the issues.*" The Supreme Court of Massachusetts held that as the assured had not paid the judgment there could be no recovery against the insurance company.

In Munro vs. Maryland Casualty Co., (*supra*), a policy was issued by this company identical in form with the one now before the Court.

In the course of the opinion of Judge Leventritt, speaking for the Supreme Court of New York, he said, (italics and small caps ours):

"I deem it necessary to consider briefly but three of the plaintiff's contentions. In addition to the $5,000 is the defendant also liable (*a*) *for the* INTEREST ON THE VERDICT *or any part of it from the time when the judgment thereon was rendered;* (*b*) for the taxable costs of the suit and for the interest on such costs, and (*c*) *for damages or loss sustained in the form of* ADDITIONAL INTEREST *as a result of defendant's delay in prosecuting the appeal had in the action?* The determination of the first and to an extent of the second question depends on the construction to be given to the policy, *whether as a contract insuring against liability* OR AGAINST LOSS FROM LIABILITY. The authorities are conflicting."

"The divergent views are well stated in two very recent cases: Sanders vs. Frankfort Ins., (72 N. H. 465) and Connolly vs. Bolster, (72 N. E. Rep. 981; Supreme Court of Mass., not yet officially reported.) In each case the policy here involved was under consideration. In the former, reviewing practically all the authorities, the Court, construing the word 'defend' as used in the second clause of the general agreements of the policy to mean 'to successfully defend' held that to avoid all inconsistency between that and the eighth clause of the general agreements, providing in effect that no action should lie against the company until after payment by the assured of the judgment recovered against him, the payment of the judgment was not a condition precedent to an action on the policy. In the latter, citing practically the same authorities, the Supreme Court of Massachusetts expresely disapproves of the doctrine and reasoning of the Sanders case and held that no right of action arose against the insurer until payment by the assured. In other words, the Sanders case construed the contract as one insuring against liability, while the Connolly case construed it as one insuring against *loss* from liability. *I follow the Connolly case as more in consonance with the natural and reasonable meaning* of the words and terms of the policy; *its criticism of the Sanders case* SEEMS TO ME SOUND AND CONVINCING.

"*If then it is a condition precedent to the liability of the defendant that the assured must first pay the judgment,*

IT FOLLOWS THAT THERE CAN BE NO LIABILITY IN EXCESS OF THE $5,000 FOR INTEREST UNTIL THE PLAINTIFF HAD COMPLIED WITH THE CONDITION WHICH MADE THE DEFENDANT'S LIABILITY COMPLETE. THERE IS NO LIABILITY FOR INTEREST OR ANYTHING ELSE UNTIL THE ASSURED HAS PAID."

In Henderson & Brother vs. Maryland Casualty Company (*supra*), the Superior Court of Pennsylvania construed a similar policy of this company in the same way, holding there was no liability until payment of the judgment by the assured after a trial of the issue. The precise question there involved was the right of the assured to interest on the amount insured, either from the date the company assumed control of the litigation or from the date of the verdict. The assured had been reimbursed the full amount of the policy, with interest from the time the judgment was satisfied; consequently the action failed.

Great stress was laid by the assured in the case last cited upon the concluding paragraph of the policy, which was identical with the paragraph on page 2 of the record, commencing with the words, "This policy shall only cover losses sustained by and liability for any claims against the assured * * *," the claim being made that by virtue of that provision the contract was one against "*liability for damages*," and that, therefore, interest ran from one or the other of the two periods mentioned, and not from the date of payment of the judgment, but the learned Court held that the paragraph was controlled by paragraph 7, which was identical with paragraph 8 in the present policy. This ruling was obviously correct. The conjunction "and" shows there must be both a loss and a liability as to each claim. It is entirely in consonance with the provisions of the policy showing the contract to be one of indemnity against "loss from liability," and not one against "liability for damages."

We may imagine a liability being incurred by the assured, which the company would have been, by the terms of its

policy, under obligation to assume without that liability being followed by an actual loss. For instance, had the company elected not to defend but to settle the suit; or had it elected not to defend, but to pay the indemity agreed upon. Either one of these courses would naturally be pursued, when a defense would admittedly be hopeless. So there might be a liability under condition 3, where it is stipulated that the assured "may provide at the time of the accident such immediate surgical relief as is imperative." But it surely never was the contemplation of the parties that the policy should be converted from one of indemity *"against loss from liability"* into a contract against *"liability for damages,"* simply by the company exercising its right and privilege to deny liability and refuse to defend, if it believed, in good faith, as in this case, that the accident in respect of which suit was brought, was not a claim covered by its policy.

As the case of Henderson & Bro. vs. Maryland Casualty Co. (*supra*), decided that the final paragraph was qualified and controlled by the 7th paragraph (paragraph 8 in this case), so in Finley vs. United States Casualty Co. it was decided that the other provisions were likewise controlled by that paragraph, the Supreme Court of Tennessee saying:

> "There are some parts of the policy copied in this opinion that are apparently on the first consideration, out of harmony with the view that the contract was intended as one of indemnity merely against loss from liability for damages rather than against liability simply. We refer to the second and third paragraphs under the caption 'General Agreements.' Similar terms were referred to in Fenton vs. Fidelity and Casualty Co., *supra*, as indicating that the contract was one simply against liability. This construction is very suggestive, and if the clause referred to stood alone, it would be difficult to assign any other meaning to them. *However, they are qualified and controlled* BY THE SEVENTH SPECIAL AGREEMENT. [Practically identical with paragraph 8 of the policy now under consideration.] When construed

along with the latter provision the following is observed to be the meaning: While the company is bound to reimburse the assured for loss actually sustained and paid by him in satisfaction of a judgment recovered against him by an employee, yet, in order to make sure as far as possible, that there shall be no recovery as a basis on which to subsequently establish a claim, the company reserves the right to defend the litigation; also to supervise any settlements that may be made, and to have a free hand in negotiating settlements of a claim made against the assured. As stated, if these provisions—that is, the second and third general agreements—stood alone, they would furnish strong reasons for construing the contract as one against liability; but, from what has just been stated, it is perceived that they have a proper place in a contract against loss from liability for damages, in the way of enabling the company to minimize the loss.

"When we consider that the provisions in the outset of the policy is to *indemnify loss * * * from * * * liability for damages*, and that in the seventh general agreement it is provided '*that no action shall lie against the company as respects any loss under this policy, unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment*,' etc., we think there can be no doubt that this policy must be construed as one belonging to the the class of policies FURNISHING INDEMNITY AGAINST LOSS FROM LIABILITY FOR DAMAGES, rather than as being a contract insuring against liability simply."

The cases relied on by the assured in the Circuit Court of Appeals have no bearing upon the question here involved. Not one of them construed a contract "against loss from liability," but they all passed upon policies "against liability for damages." One of them, however,—Anoka Lumber Company vs. Fidelity and Casualty Co., 63 Minn. 286— is the only case which has come under our observation, where the insurer, after notification of suit, refused to come in and defend. Nothwithstanding this refusal, the

suit proceeded to judgment, and, although the assured was insolvent, it was decided that the insurer was liable under its policy, it being an insurance "against all liabilities on account of fatal or non-fatal injuries suffered by an employee." As it was indisputably a contract to insure against liability and not one of indemnity against loss, the Court said :

> "From the very terms of the instrument itself, it is not merely an agreement to indemnify the plaintiff against any act of the employe, but, that in case of an accident of such a character as to injure him, whereby a cause of action against the assured arose, the insurer or company will assume the liability."

In American Employers', etc., Insurance Co. vs. Fordyce, 62 Ark. 562, the insurer bound himself to pay "all damages with which the insured might be legally charged or required to pay, or for which it *might become legally liable.*" This was manifestly a contract to pay on account of liability.

So in the case of Ross vs. American Employers' Liability Insurance Co., 56 N. J. Eq. 41. There the undertaking of the insurer in one of the policies was "that said company will pay to the insured all damages with which the insured may be legally charged under the common law or any statute ;" and the other was "that said company will pay to the insured all damages with which the insured may be legally charged or which the insured may be required to pay by reason of any liability on account of injuries inflicted upon the persons, etc."

The policy there did not undertake to indemnify the assured against loss from common law or statutory liability, but it was an insurance against all damages with which the assured might be legally charged.

In Kansas City, Memphis and Birmingham Railway Co. vs. Southern Railway News Co., 151 Mo. 373, the contract was that the insurer "agrees for such consideration to indemnify

said Railroad Company and save it harmless from all claims, demands, damages, actions, costs and charges to which the Railroad Company may be subject, or which it may have to pay by reason of any injury to any person or property, or loss of life or property suffered or sustained by any agent or employee of the News Company."

This case has no bearing upon the present controversy, because whilst the term "indemnify" is employed, the further agreement was to save the assured harmless from all claims, demands, damages, actions, etc., which was primarily an obligation independent of the question as to whether or not the claim had been paid.

We have been able to find but one case where a policy containing provisions similar to the one now before your honors, has been construed to be an idemnity "against liability for damages," and that is Sanders vs. Frankford Ins. Co., 72 N. H. 465; s. c. 57 Atl. Rep. 655. This conclusion was reached by the Supreme Court of New Hampshire after a review of all the authorities. In the following year, 1905, the Supreme Court of Massachusetts construed a like policy, and after a review of practically the same authorities, disapproved the doctrine and reasoning of the Sanders case, and held that there could be no recovery except upon payment of a judgment after a trial of the issue. As has been stated, the Supreme Court of New York and the Superior Court of Pennsylvannia also declined to follow the New Hampshire decision. Thus we have the highest Courts of Maine, New Jersey, Michigan, Tennessee, Iowa and Massachusetts, and the Supreme Court of New York and the Superior Court of Pennsylvannia holding policies similar to ours to be contracts "against loss from liability," whilst the Supreme Court of New Hampshire stands alone in construing such contracts to be insurance "against liability."

It remains for us to consider whether or not the denial by the company of liability and its refusal to defend the Heideman suits was a breach of its contract; and if so, whether

in the circumstances of this case it was such a breach as to bring about a release or waiver of the right of the company to insist that the suits should proceed to judgment after a trial of the issue, and its further right to insist that the assured should first satisfy such judgment before making claim against it under the policy.

But before doing so, let us see if the policy should not be construed as though entered into between individuals. As was said by Mr. Justice Jackson in Imperial Fire Ins. Co., vs. Coos County, 151 U. S., 452, 462:

> "Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policy or policies, embodying the agreement of the parties. For a comparitively small consideration the insurer undertakes to guaranty the insured against loss or damage, upon the terms and conditions agreed upon, and upon no other, and when called upon to pay, in case of loss, the insurer, therefore may justly insist upon the fulfillment of these terms. If the insured cannot bring himself within the conditions of the policy, he is not entitled to recover for the loss. The terms of the policy constitute the measure of the insurer's liability, and in order to recover, the assured must show himself within those terms; and if it appears that the contract has been terminated by the violation on the part of the assured, of its conditions, then there can be no right of recovery. The compliance of the assured with the terms of the contract is a condition precedent to the right of recovery. If the assured has violated, or failed to perform the conditions of the contract, and such violation or want of performance has not been waived by the insurer, then the assured cannot recover. It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate, or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms, conditions on which their contract shall continue or terminate. The courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made."

Whilst it is true, as said by your Honors in that case, where an insurance contract is so drawn as to be ambiguous, or to require interpretation, or to be fairly susceptible of two different constructions, so that reasonably intelligent men on reading the contract would honestly differ as to the meaning thereof, that construction will be adopted which is most fair to the assured, you also said, on page 463:

> "But the rule is equally well settled that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary, and popular sense."

As said by Mr. Justice Shiras, in Baltimore and Ohio Railroad Company vs. Voight, 176 U. S., 499.

> "The right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of Courts of Justice is rather to maintain and enforce contracts, than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appear that they contravene public right or the public welfare."

So Mr. Justice Field, in Riddlesbarger vs. Hartford Insurance Company, 7 Wallace, 390, said:

> "The contract of insurance is a voluntary one, and the insurers have a right to designate the terms upon which they will be responsible for losses."

Applying this rule of construction, the plain and obvious meaning of the parties to this contract was, that if an accident happened, the company was to be immediately notified in writing, with full particulars of any claim made on account thereof. This was done, and the company, believing that the driver of the wagon which collided with Mrs. Heideman was not an employee of the assured, promptly gave notice to that effect. Then provision is made for notice of

suit, and it is to be particularly observed that under condition 2, it is not every suit instituted against the assured that the company undertook to defend, but it was only such suits as might have been brought "to enforce a claim for damage on account of an accident *covered by this policy.*"

If, as has been shown, this company in good faith believed that the driver of the wagon was not an employee of the assured, it was its privilege and right to refuse to defend upon the ground that the "*accident was not covered by the policy.*"

These provisions relating to notice were for the better protection of the company and to safeguard its responsibility. The right reserved to defend or settle, unless it elected to pay the amount of indemnity under clause "A," was placed there in its own interest. As said previously in this brief, had the company believed the accident was covered by the policy, and that its chance of success in defending the suits was very remote, rather than incur the cost of defense, it could have done one of two things: Either settle with the plaintiffs, or pay the full indemnity to the assured. If, on the other hand, it elected to defend and was unsuccessful, there would have been no further liability upon its part to the assured, except to reimburse it to the extent insured, upon payment by the assured of the judgment recovered.

We do not find it ever to have been held that a failure to defend converted the contract from one "against loss from liability" to one simply "against liability." Were this effect given to such action upon the part of the company, then the company would ever be at the mercy of the assured. It might as well be contended that the refusal of a fire insurance company to pay in a case of a fire, or a life insurance company to pay in case of death, constituted a waiver of the various conditions and provisions of the policy in its favor. Such obligations were more sacred than was ours to defend; but, it cannot be that we thereby incurred any other or greater penalty than to reimburse the assured, in addition

to the indemnity agreed upon, a sum equal to reasonable counsel fees laid out and expended in doing that which we refused to do, and even then only after payment of a judgment recovered after a trial of the issue.

As our contract was only to indemnify the assured against "loss from common law or statutory liability," and as it was expressly and unequivocally agreed between the parties that no action should lie against the company "FOR ANY LOSS UNDER THIS POLICY, unless it should be to reimburse the assured for loss actually sustained and paid by him in satisfaction of a judgment," how can it be successfully contended that the assured has met with any loss whatever which is covered by the policy?

The assured boldly asserts its claim, not only in violation of the condition just referred to, but also in violation of another express condition, that it would not settle *any claim or suit* without the written authority of the company, and in the very teeth of the condition that such settlement should be "*at its own cost.*" The assured is solemnly asking this Court to permit it to recover money which it agreed should not be recoverable, simply because it feared that if it continued the defense of the suits to trial "*heavy judgments*" would be recovered against it. In other words, that the judgments would exceed the insurance, which excess it would be compelled to pay out of its own treasury. This liberality with the company's money is not justified by the reasonable construction of any provision of the policy. As the company did not consent to the compromise, paragraph 8 is paramount. There is no escape from it.

The attitude of the assured is simply this: It was sued for $13,000; it feared heavy judgments, and rather than run the risk of a trial it compromised the suits without our consent. Being exposed to the danger of judgments in excess of any possible liability of the company, it compromised "at its own cost" and now asks to be reimbursed. No such contract was ever made by the company.

It never having been judicially determined in the litigation between the Heidemans and the assured that the latter was liable for the injury complained of, and *a fortiori*, it never having been determined that Berry was an employee of the assured, the very question always in dispute between the assured and the company, it cannot be said that the company was ever in default under its policy. This dilemma of the assured cannot be more forcibly illustrated than by the sixth question submitted to your Honors.

The Supreme Court of New Hampshire, in Sanders' case (*supra*), said in part:

> "The purpose and meaning of clause 8 is apparent upon consideration of the situation which the parties must have contemplated as a probable result of their engagements. It is not probable that the parties contemplated and attempted to provide for the contingency of a suit between themselves upon a claim as to which the liability of the insurance company was conceded. An inspection of the policy, which is made a part of the case, disclosed a "special agreement" B and "general agreements" 4 and 5, to the effect that the policy does not cover certain accidental injuries for which the insured might become liable. As to whether the policy covered a particular accident was a question as to which it could be foreseen controversy might arise. It was therefore within the contemplation of the parties that a suit might be brought against the insured for accidental injuries not covered by the policy. No claim except for immediate surgical relief could accrue against the company without notice of a suit. Upon the receipt of such notice the company was called upon to recognize or deny liability. If they denied their liability and refused to perform their contract of indemnity in the manner specified in clause 2, such decision would not be binding upon the assured; and in a controversy between the parties the assumption of the defense by the company might be considered to be an admission of liability under the policy. There was no reason why they should defend if not liable. The purpose of clause 8 was, therefore, to provide for the cases, if any should

arise, where the company contended the claim arose from an accident not covered by the policy. It was intended to limit the liability of the company to damages ascertained by due course of judicial procedure in cases where they could not conduct the defense without waiving their claim that they were not liable, and as to which, if not liable, they were under no obligation to incur any expense. Its purpose was to prevent collusion between the plaintiff and the assured."

The concluding sentence of that opinion is as follows:

> "Whether in a case where the company did not so proceed [take control of the proceedings in a suit against the assured], the assured could in any form of procedure obtain any benefit from the contract of indemnity except upon proof of the payment of damages after a trial of the issues is not now before the Court."

It is too clear for argument that, when the parties to this contract for insurance made it, they contemplated that the company might wrongfully deny liability thereunder, and thereby compel the assured to resort to law to enforce its rights, and accordingly inserted paragraph 8. This paragraph, by its very terms, could never apply except to cases when there was litigation against the company, and there could not be litigation unless the company wrongfully denied its liability in whole or in part under the policy, or otherwise committed a breach of the contract evidenced thereby. Therefore, it follows that the parties never intended that a wrongful denial of liability or other breach of the contract by the company should waive this paragraph. Upon the authorities cited persons may provide what shall be their rights and liabilities in the event of breach of their contracts. If they do so provide and the condition arises which they contemplated, it can hardly be maintained that the cause which produced, and which was the only cause that could produce the condition, namely, wrongful denial of liability or other breach of the contract and resulting litigation, waived the provision

which by mutual consent was to apply when that condition should arise. Further, we fail to see anything in the policy and paragraph 8 thereof, from which it can be inferred that any denial of liability or other breach of the contract by the company at, or shortly after the accident, has any different or other effect from such a denial or breach at a later stage of the proceedings. If this is true that the policy sued on being a contract for indemnity against *loss from liability* and not simply against liability, the necessary consequence is, that the assured cannot maintain an action for a sum paid in settlement of an alleged liability because it is not "brought by the assured for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue." If paragraph 2 stood alone it might be argued with force that this clause, forbidding the settlement of claims without the consent of the company in writing, should be operative only so long as the company performed its part of the contract; but this paragraph, as has been heretofore said, is controlled by paragraph 8, which stipulates in effect in the event of a breach of the contract by the company and the settlement of a claim (not merged into a judgment) by the assured without the requisite consent, that the assured cannot recover the amount so paid.

Question three is, somewhat general in that it does not refer to any specific paragraph of the policy, but asks whether "the compromise by the assured of the suits after the assurer denied liability and refused to defend them, and the payment by the assured of the damages claimed of it pursuant to the compromise without the consent of the assurer, and without the rendition of a judgment or a trial of the issues, prevent the assured from securing any recovery of the assurer upon the policy on account of the negligence, accident and injuries described."

The amount sued for by the assured is made up of two items, namely, the sum of two hundred and fifty dollars ($250), paid counsel employed by the assured for profes-

sional services, and the sum of twenty-five hundred dollars ($2,500) paid in settlement of the suits.

The latter item cannot be recovered because of the provisions of paragraph eight of the policy, already discussed. If it is urged that paragraph 8 was not intended to cover such a case as this, where it is alleged that the company broke its contract, and that this is not an action "as respects any loss under this policy," but a suit to obtain redress for the breach of the contract evidenced by the policy, it can be answered that the company has not broken the contract by refusing to pay the assured the amount paid out by it in settlement, for in no part of the instrument does it promise to do so, and the measure of damages, if any, for its denial of liability, or for its refusal to defend the suits, assuming that its conduct in so doing was wrongful, is not the amount paid in settlement by the assured. If the policy in question had been a flat contract to indemnify the assured against any liability for damages, and unlimited as to amount, and the company breached the contract, then it could be argued with great force that the amount paid in compromise would be the measure of damages sustained by the assured. In this case, however, the policy was indemnity against loss from liability limited as to the amount, and contained no obligation on the part of the company to reimburse the assured, except for money paid out in satisfaction of a judgment. Who can say what the verdicts and judgments would have been if the Heideman suits had gone to trial? They might have exceeded the limit of the policy by a greater amount than the amount now claimed by the assured of the company, and the assured evidently feared this, for it is so alleged in its petition. On the other hand, the verdict might have been in favor of the assured. Therefore, no one can tell whether the assured has been actually damaged or not.

Now, as to the other item, for professional services. In the first place, we do not think that it is included in the

third question, for that refers to "recovery of the assurer upon the policy on account of the negligence, accidents and injuries described."

If the company refused to defend, and the assured employed counsel to defend, and did actually defend suits which it was the duty of the company to have defended, it might well be that the amount recoverable from the company for breach of the contract in this particular would be the amount paid by the assured as compensation to its counsel so employed. In this case, however, the counsel employed did not defend the suits, for the same were settled without trial or a contest. In Sanders vs. Frankfort Insurance Company, *supra*, the provision in the policy under consideration as to defense of suits was under discussion and the Court uses this language:

> "If 'to defend' means 'to protect, to secure against attack'—in short, to successfully defend—it is perfectly clear that the insurance company agree to perform their covenant of indemnity against loss by assuming the liability. This is conceded. But it is claimed that the agreement to defend against the proceedings means merely to contest the suit to final judgment. While, in a technical sense, to defend a suit is to contest it, the word 'defend' also includes the broader meanings above suggested. (Webster's Dict.) If the meaning were, as is claimed, merely the conduct of the litigation until judgment should be rendered, no reason has been suggested why the purpose was not explicitly stated. Having entered upon the defense of the suit, no way is perceived by which (at least, before judgment) the insurance company could escape liability, except by settlement with the plaintiff or payment to the assured. The engagement is not merely to contest the suit to judgment, but to 'defend against such proceedings,' meaning necessarily all the proceedings in the suit founded upon the claim for damages against the insured. The judgment is a proceeding in such a suit, as also is the execution. After final judgment, payment is ordinarily the only defense open which will defeat further progress in the proceedings—the issuance of execution."

Assuming that we are liable for failure to defend, we do not see why the assured can recover a greater sum than was paid by it to counsel to defend the suits. As this sum was $250, no recovery can be had in this action for counsel fees, because if the other items, namely, those paid to compromise the suits, can be properly excluded, the jurisdictional amount is wanting; the demurrer should also be sustained on the ground that the assured united in its petition, in addition to its claim for counsel fees, a claim which is clearly not recoverable.

Under the form of policy in this case the liability of the assured to the injured person cannot be litigated, in the *first instance*, in an action by the assured against the company, because under paragraph 8 the parties agreed that the action against the assured should proceed to judgment after trial of the issue. This protection the assured agreed to give the company. It requires but little reflection to appreciate the importance of this protection to the company. Moreover, it can readily be seen, that, as in this case, the suits having been compromised and the liability of the assured to the injured person practically admitted, at all events established by consent of the assured, but without the consent of the company, the company does not stand in the same position to have the question of the assured's liability as fairly and impartially tried as though the suits had proceeded to a trial and judgment in proceedings, in which the assured would have been vitally and pecuniarily interested.

For the aforegoing reasons we respectfully submit that the several questions should be so answered as will result in the affirmance of the judgment of the Circuit Court of the United States for the Eastern District of Missouri.

FRANK GOSNELL,
GEO. WEEMS WILLIAMS,
Attorneys, and of Counsel for
Maryland Casualty Company.